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SUPREME COURT, U.S.

No. 07-445

In the

Supreme Court of the United States

ALICE H. MORGAN, Trustee of the Morgan Family Trust Under Agreement Dated September 20, 1990, As Amended,
Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Alice H. Morgan, Trustee of the Morgan Family Trust Under Agreement dated September 20, 1990, as amended, replies as follows to the Brief for Respondent In Opposition, largely to correct some of the unsupported factual inaccuracies therein:

1. Contrary to the Brief in Opposition (at 9-10 & n.5), Mrs. Morgan of course argued in the Court of Appeals that collateral estoppel establishes the existence and reasonableness[1] of at least $131,390.00 of her state court fees.

At page 35 of *the text* of her opening brief, she quoted the *Sentinel* rule, *i.e.*, Hawaii's special collateral estoppel rule for situations where an insurance carrier has breached its duty to defend. She then argued, at page 49 of *the text* of that brief, citing *Sentinel*, that "Morgans proved that the state court awarded them $131,931.30 of their fees incurred in the state action," "irrefutably" proving them.

2. Contrary to the Brief in Opposition (at 9-10 & n. 4), that same collateral estoppel argument had of course been made in the District Court first. It had been set out, *inter alia*, in Morgans' proposed findings of fact (Excerpts of Record On Appeal, at

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[1] The questions of the existence and reasonableness of Morgans' state court fees are different from the question of allocation. The Brief in Opposition confusingly mixes the two (e.g., at 18-19). The state court's adjudication establishes existence and reasonableness of Morgans' fees, not non-allocability.

868-869), and in their proposed conclusions of law (id., at 992).

3. Contrary to the Brief in Opposition (at 8, 19), the state court's determination that the Morgans incurred reasonable attorneys' fees totaling at least $131,931.30 in the state court action is actually and impliedly shown in paragraph 2 of its judgment of June 26, 1998, set forth at A-51. Said judgment awards the Morgans $295,877.20 plus "attorneys' fees of $28.37 per day from and after July 2, 1996 until [June 26, 1998]." The $295,877.20 figure includes $111,306.31 of attorneys' fees, as shown at A-60-61. $28.37 per day x 727 days equals $20,624.99. $111,306.31 plus $20,624.99 equals $131,931.30.

4. This is not a case where a Court of Appeals merely "misapplied a properly stated" decision of this Court. The Court of Appeals failed to "state" whether it was attempting to apply a federal collateral estoppel rule, or whether it was attempting to apply a state collateral estoppel rule – let alone what that rule was. It said nothing.

This Court should therefore grant certiorari and remand to the lower courts, with instructions to apply the appropriate *state* law rule as *Migra* requires.

Sentinel establishes a special Hawaii collateral estoppel rule for instances where, as here, an insurance carrier has breached its duty to defend – without requirements of privity, etc. The only requirement of *Sentinel* is that a "material factual finding" was "actually or impliedly adjudicated." The reasonableness of $131,961.30 of the Morgans'

state court fees was actually and impliedly "adjudicated," as reflected in a state court judgment. Nothing more is needed.

5. Contrary to the Brief in Opposition (at 22), the District Court quite clearly changed its mind, and shifted the burden of proof *as to whether the fees the Morgans incurred in the state court action were attributable to covered claims*, after the Morgans rested their case-in-chief.

The language quoted in the Brief in Opposition (at 22) says exactly that. As the Court of Appeals stated, the District Court's "prior order ...related ... to the burden of proving allocability of defense costs." A-3, A-12 to A-14.

Notwithstanding Chicago Title's disclaimer (at 23), the District Court very clearly held, before changing its mind, that it would apply California law imposing upon Chicago Title the "heavy burden" of proving that fee and cost items the Morgans incurred in the state court action were *not* attributable to matters covered by their Chicago Title policy. A-12 to A-14.

6. Contrary to the Brief in Opposition (at 11), Mrs. Morgan has made it very clear that she is additionally seeking the value of a surrendered-in-settlement *claim* for a $295,877.20 deficiency against Dimiceli, asserting that the District Court should have decided that *claim* by conducting an appeal-within-a-trial, reviewing the appropriate parts of the state court record using a "reasonable appellate court" standard, and then rendering findings and conclusions – to which the appellate courts and parties could appropriately respond –

reflecting such a review. Petition, at i, ii, v, 8 n. 1, 10, 11, 13, 14, 19-20.

7. Contrary to the Brief in Opposition (at 25-26), the District Court's only finding or conclusion as to the deficiency claim is at A-24 (not A-20).

There the District Court, ignoring and overlooking the entire state court record and other submitted evidence, erroneously found that the Morgans were "not entitled to damages for the remaining claims for consequential damages" because they had purportedly failed to "provide at trial *any proof* of an entitlement to damages on those specific claims."

8. The fact that the Morgans submitted 100 pages of proposed findings of fact (Excerpts of Record on Appeal, at 784-883) and 123 pages of proposed conclusions of law (id., at 884-1006) to the District Court refutes the Brief in Opposition's contention (at 7-8) that the Morgans merely dumped thousands of pages of documents on the District Court without any guidance as to what those documents said or showed.

CONCLUSION

The requested writ of certiorari should be granted for each and all of the foregoing reasons.

Respectfully submitted,

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